

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

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APPLICATION TO CHANGE WATER RIGHT NO. 39E 30154850 BY WOLFF RANCH INC	}	PRELIMINARY DETERMINATION TO GRANT CHANGE
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On January 28, 2022, Wolff Ranch Inc (Applicant) submitted Application to Change a Water Right, Additional Stock Tanks, No. 39E 30154850 to change Statement of Claim No. 39E 38444-00 to the Billings Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of June 16, 2022. An Environmental Assessment for this Application was completed on July 18, 2022.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application to Change a Water Right Additional Stock Tanks, Form 606 ST
- Attachments
- Maps: Undated aerial imagery showing the point of diversion, pipeline, and stock tanks.
- Letter from Montana Sage Grouse Habitat Conservation Program dated January 12, 2022

Information received after application filed:

- Memo regarding communication with consultant, Wayne Yost. Originally, the Application was filed to add stock tanks to both 39E 38444-00 and 39E 37708-00. Per communication with Wayne Yost, split into two separate applications. This application, 39E 30154850, is to file for the additional stock tanks on 39E 38444-00. A new application, 39E 30155697, was submitted for the additional stock tanks on 39E 37708-00.

Information within the Department's Possession/Knowledge

- Water Right file for Statement of Claim 39E 38444-00
- DNRC water rights database

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA). **NOTE:** Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AU means animal units; AF/YR means acre-feet per year; and POD means point of diversion.

WATER RIGHT TO BE CHANGED

FINDINGS OF FACT

1. The Applicant seeks to change Statement of Claim 39E 38444-00. The Statement of Claim has a priority date of December 31, 1954, for 10 GPM from a well for stock use. The volume claimed was 8.52 AF. During the water right claim examination, pursuant to Rule 24(c) of the Montana Water Right Claim Examination Rules (formerly Rule 4.IV.), the following remark was placed on the claim and volume was not quantified in the Temporary Preliminary Decree for basin 39E: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCKWATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE. The claimed use is for 500 cattle and 7 horses (510.5 AU). The period of diversion and period of use is January 1 through December 31. The point of diversion and place of use are in the SWSWNW Section 24, T2S, R59E, Carter County. The place of use is generally located about 18 miles south-southeast of Ekalaka, MT.

WR Number	Purpose	Flow Rate	Volume	Period of Use	Point of Diversion	Place of Use	Priority Date
39E 38444-00	Stock	10 GPM	Not quantified (30 gallons per AU per day)	01/01-12/31	SWSWNW Section 24 T2S R59E Carter County	SWSWNW Section 24 T2S R59E Carter County	12/31/1954

2. Water right 39E 38444-00 is associated with Statement of Claim 39E 37708-00 and Groundwater Certificate 39E 30155545. The three wells are manifold in a pipeline system serving livestock on the ranch. Water right 39E 37708-00 is being changed under a separate application, 39E 30155697, to add the same additional stock tank locations. Groundwater Certificate 39E 30155545 was filed at the same time as this change application, 39E 30154850,

and includes all stock tank places of use that are proposed under this change application. There have been no previous changes authorized on this water right.

CHANGE PROPOSAL

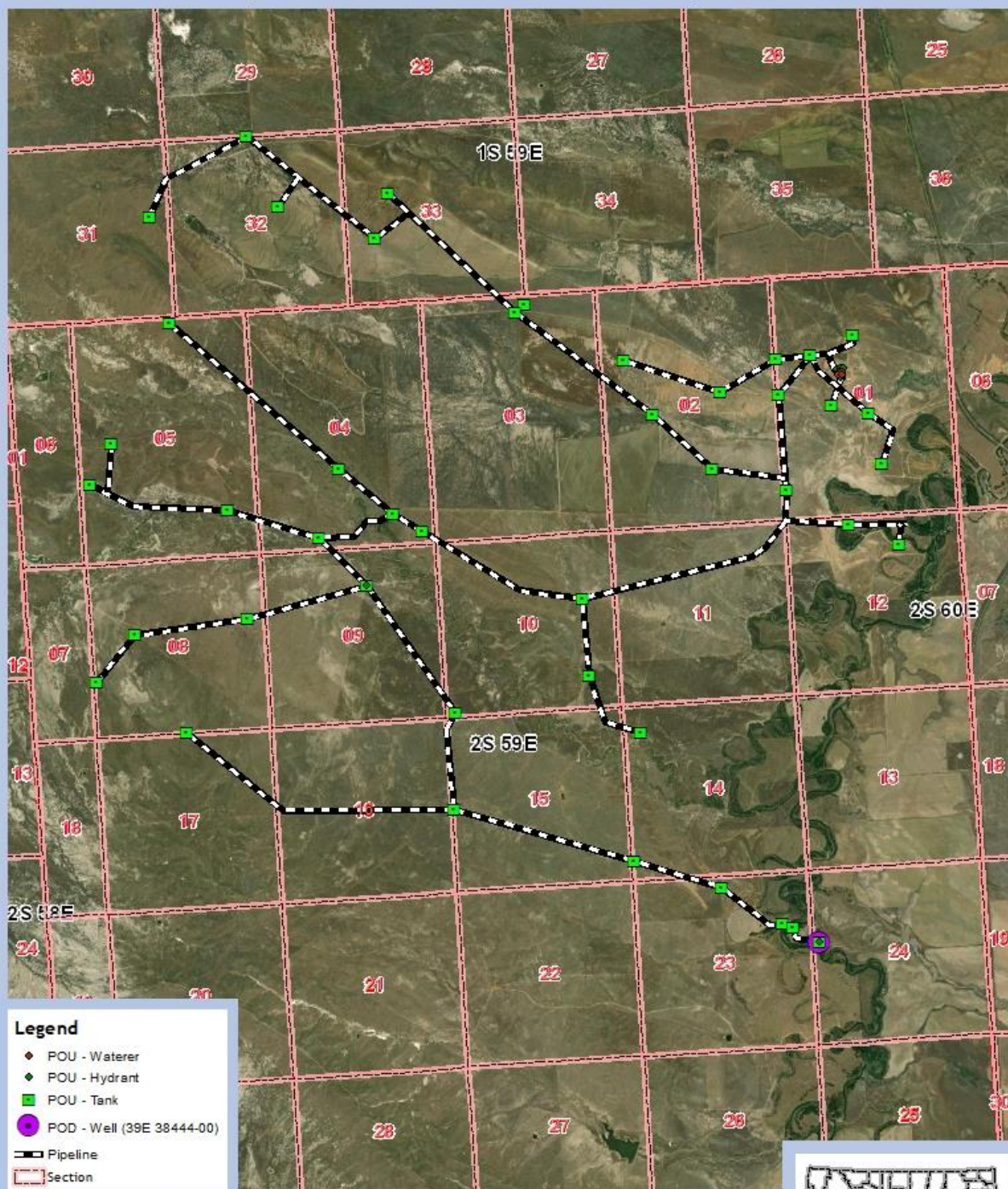
FINDINGS OF FACT

3. The Applicants propose to change the place of use by adding stock tanks to Statement of Claim 39E 38444-00. This right is for a well for stock use in the SWSWNW Section 24, T2S, R59E, Carter County. The Applicant is requesting to add 52 stock tanks and retain the original stock tank location. The new places of use are listed in the table below. Some of the places of use include more than one stock tank.

	Quarter Sections	Govt Lot	Section	Township	Range
1	SWSENE		31	1S	59E
2	NENENW		32	1S	59E
3	SESWNE		32	1S	59E
4	NENWSW		33	1S	59E
5	NWSENW		33	1S	59E
6		6	1	2S	59E
7	(4 waterers/4 hydrants)	11	1	2S	59E
8	(2 tanks)	12	1	2S	59E
9		13	1	2S	59E
10		14	1	2S	59E
11		15	1	2S	59E
12	SWNWSE		1	2S	59E
13	NWSWSW		1	2S	59E
14		10	2	2S	59E
15		12	2	2S	59E
16		14	2	2S	59E
17	SWNWSE		2	2S	59E
18	(2 tanks)	2	3	2S	59E
19	NENESW		4	2S	59E
20	SWSESW		4	2S	59E
21	NWSESE		4	2S	59E

22	SESESE		4	2S	59E
23		2	5	2S	59E
24		13	5	2S	59E
25	NWNWSW		5	2S	59E
26	SWNESE		5	2S	59E
27	NESENE		8	2S	59E
28	SWSENW		8	2S	59E
29	SWNWSW		8	2S	59E
30	SWSWSE		8	2S	59E
31	SWNWNE (1 tank, 1 hydrant)		9	2S	59E
32	NWSENE		10	2S	59E
33	SWSWSW		10	2S	59E
34	NWSESE		10	2S	59E
35	NWNENW		12	2S	59E
36	SENWNE		12	2S	59E
37	SWNWNW		14	2S	59E
38	SWSWSW		14	2S	59E
39	NWNWSW		15	2S	59E
40	NWNWNE		23	2S	59E
41	NWSENE		23	2S	59E
42	NESENE		23	2S	59E

CHG 39E 30154850 (Additional Stock Tanks 39E 38444-00)



CHANGE CRITERIA

4. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable criteria by a preponderance of the evidence, § 85-2-402, MCA. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant's burden to prove change criteria by a preponderance of evidence is "more probably than not."); Town of Manhattan v. DNRC, 2012 MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in §85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

5. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., Hohenlohe, at ¶¶ 29-31; Town of Manhattan, at ¶8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

HISTORICAL USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historical Use

6. Statement of Claim 39E 38444-00 is for stock use from a well up to 10 GPM with a priority date of December 31, 1954.
7. The preliminary decree for 39E 38444-00 indicates the volume is limited to the amount historically consumptively used for stock watering purposes. Based on the remark placed on the water right by the Montana Water Court, the maximum historical volume is limited to the amount consumptively used at the rate of 30 gallons per day per animal unit (GPD/AU). The claim is for stock use for 500 cattle and 7 horses, or 510.5 animal units (AU). Using the Adjudication standard of 30 GPD/AU, year-round stock use for 510.5 AU consumes 17.16 AF (30 GPD/AU * 510.5 AU * 365 days / 325,851 gallons/AF = 17.16 AF). With a maximum flow rate of 10 GPM, the well can only produce 16.13 AF annually. So, the Department finds the historical consumptive use to be 16.13 AF.
8. The Department considers stock use to be 100 percent consumptive, so the historical diverted volume is the same as the historical consumptive use of 16.13 AF.
9. The well has been used to supply stock water on the Applicant's property since the well was completed in 1954.
10. The Department finds the following historical use:

WR Number	Purpose	Flow Rate	Diverted Volume	Consumptive Use Volume	Point of Diversion	Place of Use	Priority Date
39E 38444-00	Stock	10 GPM	16.13 AF	16.13 AF	SWSWNW Section 24 T2S R59E Carter County	SWSWNW Section 24 T2S R59E Carter County	12/31/1954

FINDINGS OF FACT – Adverse Effect

11. The historical use for 39E 38444-00 is for 10 GPM up to 16.13 AF for stock purposes for 510.5 AU year-round (FOF 6-10). The Applicant proposes to supply water from the well to additional stock tanks through a pipeline system. The herd size will not increase under the proposed change. Neither the flow rate nor the volume will increase. There will be no change in the rate or timing of stock use. Only the place of use will change due to the addition of stock

tanks. Water will be conveyed to the additional stock tanks through a pipeline so there will be no conveyance losses. The Applicant proposes to equip each stock tank with float/shut-off valves to control flow to the tanks. The Applicant can shut down the stock tank pipeline system if call is made. There are no plans or requirements to measure diversion or use from this system.

BENEFICIAL USE

FINDINGS OF FACT

12. Applicant proposes to use water for stock which is recognized as a beneficial use under the Montana Water Use Act. §85-2-102 (5), MCA.

13. Applicant proposes to use 10 GPM flow rate and 16.13 AF diverted volume. This amount is supported by the historical beneficial use and the proposed use. The volume of 16.13 AF is the maximum amount of water the well can produce and 16.13 AF is the maximum amount consumed for the Applicants' livestock operation as described in FOF 7-8.

ADEQUATE DIVERSION

FINDINGS OF FACT

14. The system consists of a well, completed in 1954, and a pipeline system connected to 53 stock tanks that have been added over time. From the well, water is pumped at a rate of up to 10 GPM into the pipeline system. The pipeline system consists mainly of 1.25 to 1.5-inch buried PVC pipeline, while 1.5 to 2-inch buried HDPE was used for newer lines. Curb stop valves, gate valves, and ¼ turn valves regulate the flow of water through the system of approximately 30 miles of pipeline to hydrants, water fountains, and fiberglass and rubber stock tanks equipped with float/shut-off valves. Two other wells also supply water to the pipeline system. Under standard operating conditions, the well associated with 39E 38444-00 supplies the stock tanks in the lower third of the system, the well associated with Statement of Claim 39E 37708-00 supplies the stock tanks in the middle third of the system, and the well associated with Groundwater Certificate 39E 30155545 supplies the stock tanks in the upper third of the system plus the shop and house. Water can be diverted from a single well through the entire pipeline system to any of the stock tanks if there is an issue with the other wells. Due to water quality issues, the wells associated with statements of claim 39E 38444-00 and 39E 37708-00 are only for stock use and will never be used to supply water to the shop or house. The pipeline system is already constructed and operational, supporting that the means of diversion is adequate.

POSSESSORY INTEREST

FINDINGS OF FACT

15. The Applicant signed the affidavit on the application form affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (Department file)

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

16. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)("quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only"); Town of Manhattan, at ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 411 30002512 by Brewer

Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).¹

17. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11, 103 P.2d at 1072-74; Matter of Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.²

18. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.³ A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is

¹ DNRC decisions are available at:

http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp

² See also Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063(1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).

³A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of Application For Beneficial Water Use Permit By City of Bozeman, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).⁴

19. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect.

⁴ Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)("[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right."); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)("We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation"); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo., 1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G76l By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 411 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).⁵

20. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

21. In Royston, the Montana Supreme Court confirmed that an applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-

⁵ The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana's water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell's flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43(citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law—that an appropriator has a right only to that amount of water historically put to beneficial use—developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe, at ¶¶ 42-45 (internal citations omitted).

22. The Department’s rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an applicant to meet its burden of proof. Admin.R.M. 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. Admin.R.M. 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. Admin.R.M. 36.12.1901 and 1903.

23. Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case are those as they existed prior to July 1, 1973, because with limited exception, no changes could have been made to those rights after that date without

the Department's approval. Analysis of adverse effect in a change to an "existing water right" requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In McDonald v. State, the Montana Supreme Court explained:

The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972 Constitution is what the law has always contemplated in this state as the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use. . . . the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use. . . . To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained.

220 Mont. at 529, 722 P.2d at 604; see also Matter of Clark Fork River Drainage Area, 254 Mont. 11, 17,

24. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Statement of Claim 39E 38444-00 of 16.13 AF diverted volume and 10 GPM flow rate with a consumptive use of 16.13 AF. (FOF 6-10)

25. Based upon the Department's comparative analysis of historic water use to water use under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA. (FOF 11)

BENEFICIAL USE

26. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(5) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: "[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . ." McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. ARM 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana

First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)("The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes."); §85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

27. Applicant proposes to use water for stock which is a recognized beneficial use. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence stock use is beneficial and that the 10 GPM flow rate and 16.13 AF volume of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF 12-13)

ADEQUATE MEANS OF DIVERSION

28. Pursuant to §85-2-402 (2)(b), MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. Crowley v. 6th Judicial District Court, 108 Mont. 89, 88 P.2d 23 (1939); In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate).

29. In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger (DNRC Final Order 1989)(whether party presently has easement not relevant to determination of adequate means of diversion);

30. Pursuant to §85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF 14)

POSSESSORY INTEREST

31. Pursuant to §85-2-402(2)(d), MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See also ARM 36.12.1802

32. The Applicant has proven by a preponderance of the evidence that it has a possessory interest in the property where the water is to be put to beneficial use. (FOF 15)

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 39E 30154850 should be granted subject to the following.

The Applicant may add 42 places of use that correspond to the addition of 52 stock tanks. The point of diversion remains in the SWSWNW Section 24, T2S, R59E, Carter County. The period of diversion remains from January 1 through December 31. The period of use remains January 1 to December 31. The diverted flow rate remains 10 GPM, and the diverted volume is 16.13 AF/YR for stock use. The existing place of use remains for a stock tank in the SWSWNW Section 24, T2S, R59E, Carter County. The new places of use are:

	Quarter Sections	Govt Lot	Section	Township	Range
1	SWSENE		31	1S	59E
2	NENENW		32	1S	59E
3	SESWNE		32	1S	59E
4	NENWSW		33	1S	59E
5	NWSENW		33	1S	59E
6		6	1	2S	59E
7	(4 waterers/4 hydrants)	11	1	2S	59E
8	(2 tanks)	12	1	2S	59E
9		13	1	2S	59E

10		14	1	2S	59E
11		15	1	2S	59E
12	SWNWSE		1	2S	59E
13	NWSWSW		1	2S	59E
14		10	2	2S	59E
15		12	2	2S	59E
16		14	2	2S	59E
17	SWNWSE		2	2S	59E
18	(2 tanks)	2	3	2S	59E
19	NENESW		4	2S	59E
20	SWSESW		4	2S	59E
21	NWSESE		4	2S	59E
22	SESESE		4	2S	59E
23		2	5	2S	59E
24		13	5	2S	59E
25	NWNWSW		5	2S	59E
26	SWNESE		5	2S	59E
27	NESENE		8	2S	59E
28	SWSENW		8	2S	59E
29	SWNWSW		8	2S	59E
30	SWSWSE		8	2S	59E
31	SWNWNE (1 tank, 1 hydrant)		9	2S	59E
32	NWSENE		10	2S	59E
33	SWSWSW		10	2S	59E
34	NWSESE		10	2S	59E
35	NWNENW		12	2S	59E
36	SENWNE		12	2S	59E
37	SWNWNW		14	2S	59E
38	SWSWSW		14	2S	59E
39	NWNWSW		15	2S	59E
40	NWNWNE		23	2S	59E
41	NWSENE		23	2S	59E
42	NESENE		23	2S	59E

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and §85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§85-2-310, -312, MCA.

DATED this 8th day of August 2022.

/Original signed by Mark Elison/
Mark Elison, Regional Manager
Billings Regional Office
Department of Natural Resources
and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this _____ day of _____ 20____, by first class United States mail.

WOLFF RANCH INC
1751 HIGHWAY 323
EKALAKA, MT 59324-8704

WAYNE YOST
PO BOX 422
EKALAKA, MT 59324
yost@midrivers.com

Billings Regional Office, (406) 247-4415